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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ARNESTO SEGREDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a purchaser can "cause" a sale to himself, or more specifically whether a purchaser of pharmaceuticals from an unlicensed distributor can be convicted of "causing" the distributor's sales under 21 U.S.C. § 353(e)(2)(A) (in conflict with this Court's decision in United States v. Abuelhawa, 129 S. Ct. 2102, No. 08-192 (May 26, 2009)).

INTERESTED PARTIES

There are no interested parties other than those listed in the caption of the case (Petitioner Arnesto Segredo and Respondent United States of America).

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Supreme Court Rules. 1

PETITION FOR WRIT OF CERTIORARI

Arnesto Segredo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in United States v. Arnesto Segredo, 2011 WL 116259 (Case No. 10-11446, 11th Cir. 2011).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The Eleventh Circuit's order was entered on January 13, 2011.

STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

21 U.S.C. § 353(e)(2)(A)
No person may engage in the wholesale distribution in interstate commerce of drugs subject to subsection (b) of this section in a State unless such person is licensed by the State in accordance with the guidelines issued under subparagraph (B).

21 U.S.C. § 331(t)
The following acts and the causing thereof are prohibited: . . . (t) The importation of a drug in violation of section 381(d)(1) of this title, the sale, purchase, or trade of a drug or drug sample or the offer to sell, purchase, or trade a drug or drug sample in violation of section 353©) of this title, the sale, purchase, or trade of a coupon, the offer to sell, purchase, or trade such a coupon, or the counterfeiting of such a coupon in violation of section 353(c)(2) of this title, the distribution of a drug sample in violation of section 353(d) of this title or the failure to otherwise comply with the requirements of section 353(d) of this title, or the distribution of drugs in violation of section 353(e) of this title or the failure to otherwise comply with the requirements of section 353(e) of this title. (emphasis added).

28 U.S.C. § 333(b)(1)(D)

Notwithstanding subsection (a) of this section, any person who violates section 331(t) of this title by . . . knowingly distributing drugs in violation of section 353(e)(2)(A) of this title, shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

18 U.S.C. § 2(a)

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT OF THE CASE

A. INTRODUCTION

In a misguided (albeit creative) attempt to significantly expand the reach of the Prescription Drug Marketing Act ("PDMA"), a law that by its very terms carefully distinguishes between the sellers and the buyers of unlicensed pharmaceuticals, the Eleventh Circuit has permitted conflation of the two.

The Government's case is founded on the assertion that because Arnesto Segredo – on behalf of his licensed wholesale company – directed the persons who sold him certain pharmaceuticals about how he wanted his purchases to be packaged and shipped, and because he desired for the seller to become properly licensed and gave suggestions on how this could be accomplished,[1] Segredo became a co-conspirator, distributor, and aider-and-abetter of distribution to himself. One need not take the figurative slide down the slippery slope to see the absurd effects of such a determination. Under the Government's theory, a marijuana purchaser must be guilty of distribution if he asks for the purchase to be delivered in aluminum foil in front of Publix rather than accepting a baggie at Seven Eleven. A john who specifies the kind of sex he wants and directs the location for the liaison is now himself guilty of prostitution. And so on.

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[1]Segredo's instructions were made in compliance with the governing FDA regulation, 21 C.F.R. § 205.50.

The Government's interpretation of the PDMA – an interpretation imprudently adopted by the Eleventh Circuit – creates just such a perversion, despite the fact that by its very terms the relevant portion of the statute criminalizes only the unlicensed distribution of pharmaceuticals, and not the mere purchase of it (regardless of how specific the delivery instructions may be).

Such a wholesale reversal of Congress's carefully-constructed statute, and of every precedent heretofore established in similar contexts, cannot be left to stand. This Court's power of supervision should be exercised to restore the well-settled and logically necessary distinction between sellers and buyers, which Congress has carefully codified in a range of contexts, and which the Eleventh Circuit herein has ignored. Absent such a correction, the floodgates will be open to a material increase in the number of cases brought – and appealed – under similar theories in a variety of contexts. Consistent with this Court's decision in United States v. Abuelhawa, 129 S. Ct. 2102, No. 08-192 (May 26, 2009), certiorari should be granted and this case should be reversed.

B. THE CHARGES AGAINST SEGREDO

Count 1 of the two-count superseding indictment against Segredo [DE 39] charged that he engaged in an unlawful conspiracy in violation of 18 U.S.C. § 371 with three uncharged co-conspirators – Thomas Lavery, Arne List and Ofer Lupovitz. DE 39:4-5; DE 50. The conspiracy allegedly had three objectives (the

first and third of which were rejected by the jury): (1) to defraud the Food and Drug Administration (the "FDA") by obstructing or defeating its lawful functions; (2) to knowingly engage in "and knowingly cause others to engage in" the wholesale distribution of prescription drugs without a proper license, in violation of 21 U.S.C. §§ 331(t), 353(e)(2)(A), and 333(b)(1)(D); and (3) to willfully make false statements and false documents to the FDA, in violation of 18 U.S.C. § 1001(a)(2) and (3). DE 39:6.

The indictment charged that from "early 2001" until October 24, 2002, Segredo operated a wholesale prescription drug business through two companies located in Miami, Florida. DE 39:8. The indictment acknowledged that one of Segredo's companies secured a pharmaceutical wholesaler's license in Florida on July 27, 2001 and that the license was effective until July 31, 2003. DE 39:4. Segredo used these companies to purchase prescription human growth hormone ("HGH") from two California-based companies operated by List and Lupovitz, HomeoPower and RAME. The indictment revealed that RAME was licensed as a wholesaler in Vermont, the state of its incorporation, between July 2, 2002 and July 2003, DE 39:5, but not in California.

Count 2 alleged that Segredo violated 21 U.S.C. §§ 331(t), 353(e)(2)(A), and 333(b)(1)(D) by "causing" List and Lupovitz to engage in the wholesale distribution of prescription drugs without being properly licensed in California. DE 39:16. Similarly, Count 2 also charged Segredo under the aiding and

abetting statute, 18 U.S.C. § 2, with causing a distribution of HGH from an unlicensed facility in California to his company in Miami, Florida on October 2, 2002. Id.

C. BACKGROUND FACTS

Though he was merely the buyer, Segredo is the only person or entity convicted of the unlicensed distribution of pharmaceuticals in this case. In reality, however, there actually were distributors, real ones named List and Lupovitz who distributed these very pharmaceuticals before Segredo began buying from them, and continued distributing after he stopped buying from them. DE 278:74-79; DE 278:204.

Segredo's involvement with List and Lupovitz began as a result of a pre-existing sales relationship that List and Lupovitz (the actual distributors) had with a third party. One of their customers (not the only one) was Las Palmas Marketing, which was run by Tom Lavery, a chiropractor, and Robert McFadden, an attorney. DE 278:79.[2]

Segredo met Lavery at a seminar, and through Segredo's companies (one of which was licensed during nearly all the relevant time period) he began buying

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[2] Lavery, McFadden and others were charged in a separate indictment in New Hampshire. DE 279:40-41, 48. List and Lupovitz also were eventually indicted in a separate case.

HGH from Lavery for lawful subsequent resale. List and Lupovitz, in turn, were Lavery's suppliers.

At some point, List and Lupovitz contacted Segredo about selling to him directly, and Segredo agreed. Segredo gave them his real address for shipping and told them to address the packages using his real name. DE 278:91. Segredo never directed the sellers to make sure the packages looked like they were coming from somewhere other than California, Segredo never concealed that the boxes were being shipped to him in Florida, and the shipping address never changed. DE 259:39, 59.[3]

Segredo sent List a copy of his license with an insert to be included in each box called an "inter-company" shipment label. DE 278:105. List claimed that Segredo "instructed" him "very specifically on how he wanted those labels and inserts to be now a part of every shipment without question." DE 278:105.[4]

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[3] Lavery similarly testified that he shipped directly to Segredo, using invoices and package slips that openly showed the true addresses of the sender and recipient. DE 279:103, 108. There was no effort to hide the shipping details. DE 279:104.

[4] At a sidebar, the prosecutor explained that he offered this evidence as relevant to the scheme to defraud and false statement prongs of the conspiracy for which, as previously noted, Segredo was acquitted. DE 278:107.

Reflecting his interest in doing business with licensed companies, Segredo encouraged List to obtain a wholesale distribution license in California. List agreed to do so, and faxed Segredo a signed and notarized application in August 2001, as proof that List had applied for it. DE 278:98, 259:99. However, List on his own declined to go forward with the application because it required the submission of audited financial statements. DE 278:103. Segredo continued to encourage List to become licensed, which List then did in Vermont (the resident state of his company). DE 278:98-99. List also leased a 1,200 foot storage facility in Vermont for $1,000 per month and sent Segredo a copy of the lease. DE 278:178-79. List also obtained a telephone for the space and opened a bank account for RAME at Merchants Bank in Vermont.

Segredo bought the HGH from List and Lupovitz at the set price for resale. He was not a partner or shareholder in their companies, DE 259:40, and did not participate in any way in List's and Lupovitz's sales to other buyers. Neither did List or Lupovitz benefitted from Segredo's subsequent (licensed) resales of the HGH. Indeed, List conceded that what Segredo did with the products did not affect List "financially ... at all." DE 259:41. In other words, they were engaged in an arms-length, buy-sell relationship and did not have any role in each other's broader business operations.

List sold Serostim to Segredo through October 2002. DE 278:104. His last transaction with Segredo was October 2, 2002. Id.

Even though Segredo stopped buying from List on October 2, 2002, List continued to sell HGH into 2005 to other customers. DE 259:207-210.

D. SEGREDO'S MOTION TO DISMISS

Segredo moved to dismiss the indictment on several grounds. DE 52. He argued, inter alia, that he could not be charged with unlawfully "distributing" the pharmaceuticals because he did not meet the governing definition of a "distributor," defined as "to sell, offer to sell, deliver, or offer to deliver a drug to a recipient...." 21 C.F.R. § 203.3(h) (emphasis added). Segredo argued that the purchasers/recipients of unlawful distributions are excluded from this definition and, hence, cannot properly be charged with operating the unlicensed facility. DE 52:7-11; see also DE 53:7-8.

The Government responded that 21 C.F.R. § 203.3(h) does not limit liability only to sellers, and that purchasers can be convicted of "causing" the sellers to engage in the unlawful activity. The Government relied on §331 which provides, in pertinent part, that "[t]he following acts and the causing thereof are hereby prohibited." (emphasis added).

On February 10, 2009, Magistrate Judge Chris McAliley issued a Report and Recommendation ("R&R"), recommending that the district court deny the motion to dismiss. DE 143. The Magistrate Judge rejected Segredo's argument that he was only a purchaser and not a "distributor" of the drugs, finding that his purchases "caused" the sales that constituted

the unlawful distributions. DE 143:77. The district court subsequently affirmed the R&R. DE 213.

E. Segredo's Rule 29 Motion and Jury Instructions

After the government rested, Segredo moved for a judgment of acquittal. With respect to the wholesale distribution objective of Count 1, Segredo reiterated that he cannot be held culpable for distribution as a purchaser. DE 285:109. He argued that the issue was essentially legal, not factual, citing United States v. Vanegas, 294 Fed. App. 537 (11th Cir. 2008). DE 285:109-110. Segredo also argued that the "causing" language in § 331 was equivalent to aiding and abetting. DE 285:111-12. Noting that other parts of the statute expressly make "purchasing" illegal in some contexts, he explained that by way of contrast, the "distribution" crime "is always selling." DE 285:113. The Government argued that "causing" should be construed broadly to include Segredo's actions.

The district court ultimately denied the motion based upon the Magistrate Judge's pretrial ruling, which the district court had affirmed: "I believe that the reasons are well founded and supported by the very limited case law at issue here, particularly given the language of the statute itself which begins with the language: 'The following acts and the causing thereof are prohibited.'" DE 285:125. The court subsequently cited Palmer v. United States, 340 F.2d 48 (5th Cir. 1964), for the proposition that the term "causing" in

Section 331 was meant to be broader than aiding and abetting under 18 U.S.C. § 2(b). DE 285:133.

Consistent with the indictment, the district court instructed the jury that Count 1 had three distinct objectives. DE 285:130. With respect to the wholesale distribution objective, the court instructed that §§331(t), 353(e)(2)(A) and 333(b)(1)(D), make "it a crime for anyone to knowingly engage in, or to knowingly cause another person to engage in, the wholesale distribution in interstate commerce of prescription drugs in a state unless the person engaging in such wholesale distribution is licensed by that state." DE 285:132 (emphasis added). The court then defined the phrase "[t]o cause another" as "to do an act with knowledge that it gives rise to or produces said distribution." DE 285:133-34, 139. The court also gave the pattern aiding and abetting instruction under 18 U.S.C. § 2(b), which stated that "whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal." DE 285:141.

The court did issue Segredo's theory of defense instruction, which provided in pertinent part that "the mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction." DE 285:140-41.

The court also issued a special verdict form which required the jury both to be unanimous as to each objective of Count 1 and to state (yes or no) whether they found beyond a reasonable doubt "that

the last act charged in furtherance of at least one of the three objectives of the conspiracy occurred on or after September 25, 2002." DE 274:2. Again, however, the court's instruction did not require the overt act that was selected to be in furtherance of the particular objective or objectives that were relied upon to convict on Count 1.

F. THE JURY'S VERDICT AND SENTENCING

Segredo was convicted of Counts 1 and 2. However, through a special verdict concerning the three objectives of Count 1, the jury convicted Segredo only of the unlicensed distribution objective of Count 1 and acquitted him of the "fraud" and "false statement" charges. The jury then circled "yes" on the form, finding that the government had proven an overt act "in furtherance of at least one of the three objectives" but not necessarily the unlicensed distribution objective. DE 274. The district court subsequently sentenced Segredo to 60 months as to Count 1, and 10 months as to Count 2, to be served consecutively, for a total sentence of 70 months. DE 333:17; DE 334. He is currently incarcerated.

G. THE ELEVENTH CIRCUIT OPINION

On January 13, 2011, the Eleventh Circuit affirmed Segredo's conviction. The court cited the following evidence in support of Segredo's involvement in the distribution:

> List testified that Segredo controlled the content and routes of the shipments by instructing List how to remove pharmacy labels from boxes using acetone; directing List to pack with the drugs copies of the wholesale drug license and 'intercompany shipment labels' of Segredo's company to make the packages appear to be inter-company transfers of drugs; and warning List about mailing packages from Los Angeles because of the inspections performed at its airport. List also described how Segredo became involved in List's business operations by convincing List to end his relationship with coconspirator Ofer Lupovitz; recommending how to structure bank transactions to avoid financial reporting requirements; advising List how to obtain a license in Vermont; and reviewing List's lease agreement for office space in Vermont.[5]

Order at 3-4. The Eleventh Circuit did not analyze how this evidence supported a conviction, nor did it address why providing mailing and delivery instructions (which is normal buyer behavior) or why

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[5] Significantly, this testimony referred solely to Segredo's instructions with regard to the sales to Segredo himself. At no point was there any testimony that Segredo involved himself in any way in sales to List's other customers.

encouraging List and Lupovitz to become licensed and to comply with the FDA requirements set forth at 21 C.F.R. § 205.50 could constitute actions that converted Segredo from a buyer to a seller. See, e.g., 21 C.F.R. § 205.50. The Eleventh Circuit also did not address the statute's distinction between distributors and purchasers, and did not cite any cases in support of its conclusion that a buyer can "cause" or aid and abet the distribution of pharmaceuticals to himself. The Eleventh Circuit did not cite the recent Supreme Court case on this topic, United States v. Abuelhawa, 129 S. Ct. 2102, No. 08-192 (May 26, 2009).

In addition, the Eleventh Circuit affirmed the District Court's determination that Segredo's conviction was appropriate despite the fact that List's company was licensed in Vermont, the state of the company's incorporation. The Eleventh Circuit did not accept that Segredo's actions in purchasing from a licensed distributor should have shielded him from liability, and that the shipper's failure to ship from the state of his licensure at most should have been held against the seller, and not against Segredo.

REASONS FOR GRANTING THE WRIT

A writ should be granted in the exercise of this Court's powers of supervision because the Court of Appeal's decision departs substantially from all other reported decisions, obviating the important distinction between buyers and sellers *in arms-length transactions*. A writ also should be granted to reverse the Government's dangerous trend in seeking to obliterate statutorily-created distinctions between parties with different roles in a variety of contexts, which is an important question of federal law in contravention of a recent opinion of this Court.

In affirming Segredo's conviction for distributing unlicensed pharmaceuticals to himself, the Eleventh Circuit departed substantially from accepted legal principles and created a precedent with dangerous consequences. Not only does the Eleventh Circuit's opinion offer a statutory interpretation different from any other previously accepted, but it does so in derogation of a recent opinion of this Court that the Eleventh Circuit did not even address: United States v. Abuelhawa, 129 S. Ct. 2102, No. 08-192 (May 26, 2009).

In Abuelhawa, this Court unanimously decided a strikingly similar issue in the context of a different statute. The petitioner purchased two grams of cocaine

from a seller, accomplishing the sale through six telephone calls. The government charged the petitioner not with the normal two misdemeanor counts, but rather with six felony counts under the Controlled Substances Act, 21 U.S.C. § 843(b), which "makes it a felony to 'use any communication facility in committing or in causing or facilitating' certain felonies prohibited by the statute." Abuelhawa, 129 S. Ct. at 2104 (emphasis added).

The Fourth Circuit accepted the government's argument – as the Eleventh Circuit has done here – that the buyer "facilitated" and "caused" the distribution because the buyer's use of the phone "'undoubtedly made [the] cocaine distribution easier, in fact, it made the sale possible." Id. at 2105 (internal quotations omitted).

This Court disagreed. Although recognizing that the plain meaning of "facilitating" or "causing" might support the petitioner's conviction, id. at 2105 and 2108 n.5, "stopping there would ignore the rule that . . . statutes are not read as a collection of isolated phrases. . . ." Id. at 2105.[6] This Court then rejected

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[6] The Abuelhawa opinion cites prior cases in analogous contexts which are undermined by the reasoning employed by the Eleventh Circuit here. See Abuelhawa, 129 S. Ct. at 2106, citing Lott v. United States, 205 F. 28, 29-31 (9th Cir. 1913) (purchasers of liquor not culpable for aiding or abetting illicit sale); Gebardi v. United States, 287 U.S. 112 (1932) (reversing conviction of woman who voluntarily crossed

state lines for aiding and abetting the transport of a woman for the purpose of prostitution in violation of the Mann Act); United States v. Farrar, 281 U.S. 624 (1930) (purchaser not liable under Prohibition Act; liability limited to seller). Cases from other courts are in similar conflict. See United States v. Harold, 531 F.2d 704, 705 (5th Cir. 1976) (rejecting "out of hand the government's contention that because Harold went to the airport 'for a fix' he is guilty as a recipient of aiding and abetting the distribution of heroin."); United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977) (a person "who receives the drug for personal use" is "liable as an aider and abettor of the agent's distribution to him."); Brown v. State, 203 So. 2d 700, 702 (Ala. App. 1967); Howard v. State, 496 P.2d 657, 660 (Alaska 1972); State v. Cota, 956 P.2d 507, 509-10 (Ariz. 1998); Sweatt v. State, 473 S.W.2d 913, 914-15 (Ark. 1971); People v. Mimms, 110 Cal. App. 2d 310, 314 (1952); Sobrino v. State, 471 So. 2d 1333, 1335 (Fla. 3rd DCA 1985); State v. Celestine, 671 So. 2d 896, 897-98 (La. 1996); State v. Lyons, 838 P.2d 397, 399-401 (Mont. 1992); State v. Utterback, 485 N.W.2d 760, 770 (Neb. 1992), overruled on other grounds by State v. Johnson, 589 N.W.2d 108 (Neb. 1999); Tellis v. State, 445 P.2d 938, 940 (Nev. 1968); State v. Pinson, 895 P.2d 274, 276 (N.M. App. 1995); State v. Nasholm, 467 P.2d 647, 648 (Or. Ct. App. 1970); State v. Fox, 313 N.W.2d 38, 40 (S.D. 1981); Brown v. State, 557 S.W.2d 926, 926 (Tenn. Crim. App. 1977); Robinson v. State, 815 S.W.2d 361, 363-64 (Tex. App. 1991); State v. Berg, 613 P.2d 1125, 1126 (Utah 1980); State v. Morris, 896 P.2d 81, 84-85 (Wash. Ct. App. 1995); Wheeler v. State,

the very blurring of the lines that has been permitted in the instant case:

> Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other. A buyer does not just make a sale easier; he makes the sale possible. No buyer, no sale; the buyer part is already implied by the term 'sale,' and the word 'facilitate' adds nothing.

Id.; see also 2108 n.5 (applying same analysis to term "causing").

This Court also emphasized that "where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature. . . ." Id. at 2106. The Eleventh Circuit expressly ignored this important principle, instead circularly finding that lenity as to what "causing" means does not apply because the statute prohibits "causing." Order at 2-3.

This Court's intercession in the instant case is required to curtail this trend towards equating the buyer with the seller through the simplistic analysis that the buyer, by definition, "causes" a wrongful act to

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691 P.2d 599, 601-02 (Wyo. 1984).

occur. It is necessary to prevent the wrong identified by the Court in Abuelhawa – that "Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense it had dropped to a misdemeanor with the right." Abuelhawa, 129 S. Ct. at 2107.

Moreover, well-established principles of statutory construction preclude the outcome reached by the Eleventh Circuit. Segredo was convicted of violating and conspiring to violate 21 U.S.C. §§ 331(t), 353(e)(2)(A), and 333(b)(1)(D) by agreeing to knowingly engage in "and knowingly cause others to engage in," the wholesale distribution of prescription drugs without a proper license. Section 331 provides that "[t]he following acts and the causing thereof are hereby prohibited." (Emphasis added). Subsection (t), in turn, prohibits various categories of conduct, some of which expressly prohibit both the "sales" and "purchases," while others – including the one at issue here – prohibit only "distribution." The operative penalty provision, Section 333(b)(1), parallels the categories contained in Section 331(t), and employs similar precision as to which acts are penalized for both sellers and buyers, and which are penalized only for sellers (the provision at issue here being one of the latter).

The district court's construction of §§ 331, 333 and 203.3(f) improperly renders superfluous Congress' repeated use of different terminology when it wanted to address "purchasers" as distinct from "distributors." If the term "distribution" already included both sellers and purchasers, then Congress' use of different

terminology within these separate, but successive, subsections of these statutes would make no sense. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). See also, e.g., CBS Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001) ("where Congress knows how to say something but chooses not to, its silence is controlling.") (quoting In re Griffith, 206 F.3d 1389, 1394 (11th Cir. 2000)).[7] As this Court recognized in Farrar in the context of the prohibition laws, "it is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history, and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability." Farrar, 281 U.S. at 634.

Because the terms "aid or abet," "cause" and "facilitate" are functionally equivalent, the principle

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[7] It was no mystery to Congress when enacting this statute that if there is a distributor of an unlicensed pharmaceutical, there also is a purchaser. If Congress wanted to include the purchaser within the scope of this subsection, it was free to do so. McNally v. United States, 483 U.S. 350 (1987). Until it does, the purchase of such pharmaceuticals cannot be treated as if it is the sale.

that a buyer of drugs does not aid or abet his dealer's distribution directly applies here. Just as a buyer of drugs for personal use is not guilty of "aiding or abetting" his dealer's distribution for purposes of the aiding and abetting statute, 18 U.S.C. § 2(a), he also is not guilty of "causing" his dealer's distribution for purposes of § 331.

Furthermore, the Eleventh Circuit ignored the fact that conspiracy requires a joint objective which is not present in a buyer-seller transaction. As the Eleventh Circuit itself held in United States v. Dekle, 165 F.3d 826, 829 (11th Cir. 1999), "this joint objective is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs. Although the parties to the sales agreement may both agree to commit a crime, they do not have the joint criminal objective of distributing drugs." The Eleventh Circuit's analysis "reduces to an assertion that a wholesale customer of a conspiracy is a co-conspirator per se." But "there are practical reasons for not conflating sale with conspiracy. . . . What is necessary and sufficient is proof of an agreement to commit a crime other than the crime that consists of the sale itself." United States v. Colon , 549 F.3d 565, 569 (7th Cir. 2008) (internal quotation omitted).

The Eleventh Circuit's interpretation suffers from the fundamental flaws of construing the terms of § 331 in strict isolation, and of assuming that Congress invariably intends the terms of a statute to carry their broadest possible meaning. And, as in Abuelhawa, the Eleventh Circuit's construction ignores the fact that

Congress distinguished between "distribution" and "purchasing" in the various subsections of §§ 331 and 333, and that the definition of "distribution" includes "sellers" but not "purchasers."

CONCLUSION

The Government charged Segredo with violating his own duties under FDA regulations, and he was acquitted by the jury of these charges. This should end the discussion, as the wrongs of the individuals who sold to him belong solely to those individuals. This Court should grant certiorari and intervene to correct the Eleventh Circuit's substantial error on an important question of federal law that will, if left to stand, significantly shift the important legislative balance between buyers and sellers.

Miami, Florida
April 2011

Respectfully submitted,

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[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-11446
Non-Argument Calendar

D.C. Docket No. 1:07-cr-20766-ASG-1
UNITED STATES OF AMERICA,
Plaintiff - Appellee,
versus
ARNESTO SEGREDO,
a.k.a. Arnold Segredo,
Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 13, 2011)

Before BLACK, WILSON and PRYOR, Circuit Judges.
PER CURIAM:

Arnesto Segredo appeals his convictions for conspiracy to engage in and causing others to engage in the unlicensed wholesale distribution of prescription drugs, 18 U.S.C. § 371; 21 U.S.C. §§ 331(t), 333(b)(1)(D), 353(e)(2)(A), 333(b)(1)(D), and causing the unlicensed wholesale distribution of prescription drugs on October 2, 2002, id. §§ 331(t), 333(b)(1)(D), 353(e)(2)(A). Segredo argues that his indictment was deficient, there is insufficient evidence to support his convictions, the prosecutor's closing argument was

improper, and the district court erred in instructing the jury. We affirm.

Segredo's indictment sufficiently alleged his crime of conspiracy. Segredo was charged with conspiring to engage in and "causing," id. § 331(t), others to "engage in the wholesale distribution . . . of drugs" without a license, id. § 353(e)(2)(A). The indictment described how Segredo obtained large quantities of prescription drugs from his three coconspirators whom he knew lacked licenses to distribute those drugs and how Segredo guided the activities of his coconspirators.

Segredo contends that the indictment refers to him as a "purchaser" and bars his prosecution for distributing, but the indictment described in detail how Segredo maintained "regular and frequent contact" with his coconspirators, instructed them to relabel and package drugs, and advised them about shipping routes and licensure. See United States v. Munoz, 430 F.3d 1357, 1366 (11th Cir. 2005).

Segredo also contends that the rule of lenity requires that we interpret the Prescription Drug Act to bar a purchaser from being prosecuted as a distributor,but his argument ignores that the Act prohibits an individual from "causing," 21 U.S.C. § 331(t), others to distribute pharmaceuticals without a license. The Act does not delimit who can "cause" an unlawful distribution. "Lenity . . . serves only as an aid for resolving an ambiguity[,] . . . not to . . . beget one." Albernaz v. United States, 450 U.S. 333, 342, 101 S. Ct. 1137, 1144 (1981). The district court did not err by

denying Segredo's motion to dismiss his indictment.

The district court did not err by denying Segredo's motion to acquit him of the conspiracy charge, which is supported by ample evidence. One of Segredo's coconspirators, Arnie List, testified about Segredo's involvement in the unlicensed distribution of the prescription drugs. List testified that Segredo controlled the content and routes of the shipments by instructing List how to remove pharmacy labels from boxes using acetone; directing List to pack with the drugs copies of the wholesale drug license and "intercompany shipment labels" of Segredo's company to make the packages appear to be inter-company transfers of drugs; and warning List about mailing packages from Los Angeles because of the inspections performed at its airport. List also described how Segredo became involved in List's business operations by convincing List to end his relationship with coconspirator Ofer Lupovitz; recommending how to structure bank transactions to avoid financial reporting requirements; advising List how to obtain a license in Vermont; and reviewing List's lease agreement for office space in Vermont. List also testified that Segredo tried to preserve and protect the conspiracy after its discovery by the Food and Drug Administration by offering to "loan" List $500,000 to "relocate to a tranquil area."

Segredo argues that he was wrongfully prosecuted for causing List to distribute prescription drugs in October 2002 and for conspiring with List because List had obtained a distributor license in Vermont, but these arguments fail. The Act prohibits

a person from distributing prescription drugs wholesale "in a State unless such person is licensed by the State." 21 U.S.C. § 353(e)(2)(A). Segredo argues that because "List was from Vermont, was licensed in Vermont . . ., and leased office space in Vermont . . ., List 'offered to sell' or offered to deliver' . . . out of Vermont . . .," but the record does not support Segredo's argument. List testified that he conducted business with Segredo "through the end, through October, 2002" in California without a license. Segredo makes a related argument that the October transactions were legal and could not serve as the overt acts from which to run the five-year statute of limitation to indict him for conspiracy, but the record establishes that Segredo's indictment was timely. See United States v. McNair, 605 F.3d 1152, 1213 (11th Cir. 2010). Because List distributed prescription drugs illegally on October 2 and October 24, 2002, the prosecution timely obtained an indictment charging Segredo with conspiracy on September 25,2007.

Segredo also argues that the district court plainly erred by permitting the prosecutor during closing arguments to discuss the Prescription Drug Marketing Act and by mentioning the Act in its instructions to the jury, but we disagree. To constitute plain error, the argument of the government must be misleading or "appeal to the jury's passion or prejudice," United States v. Rodriguez, 765 F.2d 1546, 1560 (11th Cir. 1985), to the extent that it "invites the jury to judge the case upon standards and grounds other than the evidence and law of the case," United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997). The government made three brief statements

explaining the purpose and operation of the Act, and those remarks were informative, not inflammatory. Later, when the district court asked Segredo if he had any objection to the "add[ition of] a discussion of the Prescription Drug Marketing Act," Segredo responded, "I don't object to it." Segredo waived his complaint to the jury instruction. See United States v. Fulford, 267 F.3d 1241, 1247 (11th Cir. 2001). There was no error, plain or otherwise, in the discussion of the Act at trial.

We AFFIRM Segredo's convictions.

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

United States of America

v.

ARNESTO SEGREDO

a/k/a Arnold Segredo,

Case Number - 1:07-20766-CR-GOLD-1

USM Number: 79796-004

Counsel For Defendant: David O. Markus, Esquire

Counsel For The United States: AUSA Jose A. Bonau

Court Reporter: Joseph Millikan

The defendant was found guilty on Count(s) 1 and 2 of the Superseding Indictment.

The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 371	Conspiracy to commit offense.	10/24/02	1
21 U.S.C. §§ 331(t) and 353(e)(2)(A)	Unlicensed wholesale distribution of prescription drugs.	10/02/02	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to

pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

2/18/2010

_____

ALAN S. GOLD
United States District Judge

February _____, 2010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of seventy (70) months. The term consists of terms of 60 months as to Count 1 and 10 months as to Count 2, to be served consecutively.

The Court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to FCI Miami so that he may be close to family.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for concurrent terms of three years as to Counts 1 and 2.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess,

use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and

shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$200.00	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $200.00 due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE

ATTN: FINANCIAL SECTION

301 N. MIAMI AVENUE, ROOM 150

MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable

immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.